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Case No. 98-223

In The
Supreme Court Of The United States
October Term 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

Respondent White and supporting *amicus*, National Association of Criminal Defense Lawyers argue in support of the decision of the Florida Supreme Court below. None of the arguments advanced are persuasive; nor do they provide a compelling basis to adopt the rationale of the Florida Supreme Court.

Both Respondent and his supporting *amicus* recognize the Fourth Amendment warrant preference is not absolute, but

subject to specifically established exceptions, carefully drawn, jealously guarded. What both fail to recognize is the well established, carefully drawn exception that an antecedent warrant is not required for seizure and subsequent search of an instrumentality where probable cause exists under, for example, the forfeiture statutes.[1]

White makes much of the fact that his cocaine stash was secreted inside a paper towel which was in turn placed in the vehicle ashtray, making it not susceptible to view from a person outside his car. However the fact that cocaine was ultimately found in the automobile is of no consequence, since the seizure was not premised on the illegal stash, but rather based on the fact that the auto was used to facilitate a previous video-taped

[1] In The Palmyra, 12 Wheat. 1, 6 L. Ed 531, 25 U.S. 1, 8 (1827), the privateer was lawfully seized and subsequently searched on probable cause that it had earlier violated an Act of Congress proscribing piracy against United States vessels on the high seas. In Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 2d 543 (1925), the car was seized and subsequently searched without warrant on probable cause that it had been used to violate prohibition statutes. In Calero-Toledo v. Pearson Yacht Leasing Co.,416 U.S. 663, 94 S. Ct. 2080, 40 L.Ed. 2d 452 (1974), the yacht was validly seized and forfeited without antecedent warrant on probable cause that it had earlier been the situs of violation of Puerto Rican drug statutes. The removal of highly mobile instrumentalities from the warrant requirement of the Fourth Amendment has long been recognized. "The exception recognized in *Carroll* is unquestionable one that is 'specifically established and well delineated.'" United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982).

drug deal. Additionally, any asserted privacy interests in the contents of the ashtray in the car was diminished by the policing authority's right to inventory the contents of the car once seizure resulted from the probable cause. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The search here was a plain, straightforward Opperman inventory search conducted on the vehicle. The scope and validity of the search other than the attending inventory search following the seizure, was never contested below, only the constitutionality of the seizure of the vehicle under the Fourth Amendment[2]. See, California v. Carney, 471 U.S. 386,390, 105 S. Ct. 2066, 2068, 85 L. Ed. 2d 406 (1985); Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 (1967).

The issue here is not probable cause to search the vehicle once seized, the issue is probable cause to initially seize based

[2] White also claims at n.2 of his brief that the Florida Contraband Forfeiture Act provided probable cause for this seizure. The Contraband Forfeiture Act is not a legislative grant of probable cause. The probable cause here was supplied when White was seen and videotaped dealing drugs out of his car. The Forfeiture Act on its own terms is only triggered when there is probable cause to implement it. When there exists independent probable cause to trigger it, the act then provides the statutory authority, procedure, and mechanism to seize the offending item.

on a belief that the car has been used to violate the provisions of the Florida Contraband Forfeiture Act. Any misconception over the Florida Supreme Court's statement that, "Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that Carney and the automobile exception are inapposite as authority." [A-72] is not germaine to the real issue here. Indeed there was no probable cause to believe contraband was within the car, therefore it could not properly be said that there was probable cause for a search warrant for the car. However this begs the question of whether there was probable cause to seize White's vehicle used in prior video-taped drug deals under the act. The Florida Legislature, similar to the Federal Forfeiture Statute *see,* 21 U.S.C. s 881 and the Uniform Controlled Substance Act, *see,* 9 U.L.A. s 505, has authorized the warrantless seizure of a vehicle based upon the probable cause that it has been used to facilitate a drug transaction. Neither forfeiture scheme violates the Fourth Amendment prohibition against unreasonable searches and seizure.[3]

[3] Seizure and forfeiture of automobiles which are used to facilitate offenses against the law are a common and accepted measure to deter illegality. For example, New York City has recently launched a program to seize and forfeit automobiles under NYC Administrative Code §14-140 when the driver is arrested for a Driving While Intoxicated offense. New York courts have held an automobile is forfeitable in circumstances where a teacher went into his car, which had been parked for hours in the school parking lot, to sniff cocaine, holding the car was "employed in aid or furtherance of crime." Property Clerk, New York City Police Department v. Vogel, 175 A.D.2d 760, 573 N.Y.S.2d 511, 512 (A.D. 1 Dept. 1991). The Vogel court, reversing the trial court's dismissal, said the City should be allowed to prove its claim that the car was utilized for a "portable haven for carrying on illicit activities during the school day." Id. Likewise, in Property Clerk, New York City Police Department v. Pagano, 170 A.D.2d 30, 573 N.Y.S.2d 658 (A.D. 1 Dept. 1991), the state appellate court held that a parent could be required to forfeit his car where his son had (unbeknownst to the parent) committed the offense of reckless driving by leading police on a high speed chase. Such a forfeiture could be ordered even where the criminal driving charge against the son was dismissed. 573 N.Y.S.2d at 569-560. However, relying in part on Calero-Toledo, infra, the court held the City had to establish the car owner "permitted or suffered the illegal use of the property", Id. at 660 (internal quotation mark and emphasis deleted), and that the proof in this case was deficient on this requirement. Id. at 661.

Once probable cause existed under the forfeiture statute, the question then simply becomes whether police had to move immediately without warrant under the forfeiture act to seize the car and/or did the probable cause continue to exist until a later time to seize, without warrant, under the same act. Prior usage of the vehicle in violation of the forfeiture law is sufficient to generate the necessary probable cause.[4]

[4] White failed to assert a due process challenge as to whether a pre-seizure warrant was required, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 676-680, 94 S. Ct. 2080, 2088-2090, 40 L. Ed. 2d 452 (1974); United States v. Valdes, 876 F.2d 1554, 1560 at fn. 12 (11th Cir. 1989).

White contends that utilization of the Florida Contraband Forfeiture Act transforms seizures made thereunder into some form of *per se* exemption from the Fourth Amendment's warrant preference. This is no more true than had the police, at the time they witnessed and videotaped respondent dealing drugs out of his car, immediately seized the automobile. It is not argued by any party that the police would have been required to obtain a warrant to seize and search the automobile at that instant in those circumstances. Indeed, there would be no question that the warrantless seizure and search of the car was permissible, along with the following forfeiture action under the statute and the introduction into evidence at White's criminal trial. It does not become any more a *per se* exception to the Fourth Amendment warrant preference to permit later warrantless seizure under the forfeiture statute.

White attaches much to the proposition that his automobile in and of itself is a lawfully possessed thing. However, this is a distinction without a difference.[5] His car, once used to

[5] The vehicle, lawful in its nature, changed its character when White used it as an instrumentality in his drug business. Once used to effectuate illegality, as stated in The Palmyra, 12 Wheat. 1, 25 U.S. 1, 14, 6 L.Ed. 531 (1827), "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the

distribute drugs, became the offender at the time so used, whether the offense be intrinsically unlawful, or only so by operation of law. Items that are perfectly lawful and legitimate are seizable and subject to forfeiture if they have been the *res* of violation of a statutory proscription or requirement. See One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (jewels and ring forfeited due to being brought into the country without being declared, as required by customs laws); United States v. Eight Thousand Eight Hundred and Fifty Dollars in U.S. Currency, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) (United States currency).

White notes that in the briefs of *amici*, the Solicitor General of the United States and the National Association of Attorneys General, it is argued that the seizure of the automobile was permissible under the "plain view" doctrine. Wherever and whenever police thereafter observe the instrumentality in plain view, they can validly seize it. Especially so in a case like this, where car is seized while in the parking lot of a retail store, and not in the driveway of a private

offense be malum prohibitum, or malum in se."

residence or some other such locus where there exists a possible reasonable expectation of privacy. Compare Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion) (seizure of car from a public, commercial parking lot) with Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion) (seizure of car from a residential driveway).

The fact that there was a 68-day hiatus between the time probable cause arose and the date of seizure implicates no constitutional protection, and is akin to an argument that the vehicle had a right to a speedy arrest for example. United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). It is certainly no answer to say the police had time to get a warrant in this interval. Cooper. The seizure without warrant did nothing to adversely affect White's ability from asserting any possible defense under the forfeiture act. There is thus no constitutional deficiency from that perspective. United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency, supra.

In attempting to distinguish case law permitting warrantless seizures of persons, White argues that persons so seized have a plethora of procedural protections. This argument ignores

equally voluminous procedural protections regarding the seizure of a vehicle, many of which are set out in the Florida Contraband Forfeiture Act. His point, apparently, is that some sort of constitutional violation is established because, under Florida law, a person seized without warrant must have a first appearance before a magistrate within 24 hours of seizure. In contrast, he argues the car seized without warrant does not have the propriety of its seizure examined by a magistrate, under the statute, until 10 days after such is requested. All of which ignores the central point that persons can be seized and jailed without antecedent warrant, as well as inanimate objects. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (seizure of person); G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1997) (seizure of automobile of alter ego corporation from a public street to satisfy a personal tax liability).

Lastly, White attempts to explain the holdings permitting the warrantless seizure of persons on the basis that such is permissible because it serves important public safety concerns. The obvious point, of course, is that equally weighty public safety concerns are served by removing vehicles used in drug

deals from circulation.[6] Such concern has been noted with approval by the Court. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, at 2090, 40 L.Ed.2d 452 (1974): Seizure fosters "the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions."

[6] That police waited 68 days to do this does not undercut the validity of this public interest concern. Police may have good and valid reasons to wait before immediately seizing a car, such as pursuing other leads generated by the observed transaction, not wanting to "burn" a confidential informant, or seeing if it is possible to discover bigger players in the drug business, such as a dealer's source of supply, by surveilling the dealer over a period of time. All legitimate reasons -- which do not denigrate the original probable cause to seize.

CONCLUSION

Based on the foregoing discussions, Petitioner, the State of Florida respectfully submits that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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